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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 403

UNITED STATES OF AMERICA,

Petitioner,

vs.

GERRITT JOHANNES VAN LEEUWEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Questions Presented

I.

Whether the Fourth Amendment is violated when post-office and/or customs officials knowingly detain registered, first-class packages for the unreasonable period of at least twenty-nine hours and at least twenty-four hours after said officials were in possession of information sufficient to enable them to obtain a Search Warrant to open the packages and discover whether they contained illegal matter.

II.

Whether FRCP 41 (e) is violated when a Search Warrant is granted solely on an Affidavit which alleges five facts, four of them being based on hearsay evidence compounded on top of hearsay evidence.

Statement

The relevant facts are undisputed. They are set forth below in two sections; the first section sets forth the facts known to officials prior to the crucial time and date of 2:35 p.m. on Thursday, March 28, 1968, and the second section sets forth the few additional facts learned after that time and date.

Between 1:30 p.m. and 2:35 p.m. on Thursday, March 28, 1968, postoffice, police and customs officials became aware of the following facts (Tr. 16, 28, 39-40, 47-48; A. 15-16, 19):

1) That Appellee, Gerritt Johannes Van Leeuwen, deposited for first-class mailing at the postoffice in Mount Vernon, Washington, two packages; declared that each contained coins, and insured each package for $10,000 on which proper postage and rates were paid (Tr. 2, 6, 7, 11, 14, 90; A. 15, 19).

2) That one package weighed approximately nine pounds and the other eleven pounds (Tr. 21).

3) That the postal clerk, Mr. Thomson, had insisted that the packages be sealed like a letter before he would accept them as the corners were completely unsealed (Tr. 10).

4) That the suspicions of the Post Office window clerk, Gerald D. Thomson, were aroused because of the amount of

money involved in the transaction and the rarity of its occurrence, and he notified, and delivered possession of the two packages to, the Captain of the Mount Vernon Police Department, the assistant postmaster, and a member of the local fire department (Tr. 2, 3, 16, 20).

5) That additional suspicions of Charles Belgard, Captain of the Mount Vernon Police Department, who coincidentally happened to be in the Post Office at the time of mailing, were aroused because of his recognition of the falsity of the return addresses listed on each of the two packages (Tr. 17-18).

6) That the return address on each package was the same and, although a proper address, it was fake in that each referred to the addressor, or sender, as one G. J. Williams of No. 8, Campus Village, Mount Vernon, Washington, which is a private student dormitory, when, in fact, no G. J. Williams had been "anywhere within that Campus Village" and that the last time No. 8 Campus Village had been occupied was "two months prior to March 28" (Tr. 6, 7, 17, 18, 21, 25; A. 6, 18, 19).

7) That Captain Belgard advised the postal window clerk, Mr. Thomson, to accept the packages and contact his superiors about them (Tr. 18, 26).

8) That the person or persons mailing the packages were observed to leave the Post Office in a car with Canadian license plates by Captain Charles A. Belgard, a skilled observer, who copied down the license plate number (Tr. 18, 39-40; A. 6, 15).

9) That Captain Charles Belgard telephoned Sergeant James E. McKenzie, Royal Canadian Mounted Police,

Canada, concerning the mailing of the two packages (Tr. 28).

10) That Sergeant McKenzie conducted two routine inquiries as a result of Captain Belgard's telephone call, and then, before 2:30 p.m., telephoned Mr. Raphael J. O'Hearn, United States Customs Agent in charge at Seattle (Tr. 28, 40).

11) That United States Customs Agent O'Hearn, at about 2:30 p.m. and "immediately after receiving this information" from Sergeant McKenzie, "called the United States Customs Agency Office in Los Angeles which has Van Nuys, California in its area . . ." (Tr. 40-41), and thereafter contacted the Postal Inspector and assistant postmaster in Mount Vernon, telling them that "we had reason to believe that they (the packages) were deposited in violation of law" (Tr. 41; A. 16).

12) That one of the two addressees, namely Harry Gordon, P.O. Box 2133, Van Nuys, California, was "a known dealer in the illegal traffic of gold coins" as revealed by U.S. Customs Agents in Los Angeles. The other addressee, namely Davis Carr, P.O. Box 7646, Nashville, Tennessee, was not checked by O'Hearn on March 28, 1968 (Tr. 5, 39-40, 51; A. 5, 16).

13) That by not later than 2:35 p.m. (Pacific Standard Time) on March 28, 1968, United States Custom Official O'Hearn had all of the above information and that the Eastern Standard Time was then not later than 5:35 p.m. (Tr. 39-52).

14) That the record contains nothing indicating that any Post Office Official, United States Customs Official, or any

other official, made any attempt at any time after 2:35 p.m. (Pacific Standard Time), 5:35 p.m. (Eastern Standard Time), to check the authenticity of the addressee in Nashville, Tennessee listed on the second of the two packages.

On the next day, Friday, March 29, 1968, Customs Officials gathered the following two additional facts:

1) That from a morning telephone call (A. 16) to the Customs Agent in charge at Mobile, Alabama (which has jurisdiction over Nashville, Tennessee), United States Customs Official O'Hearn learned that the second addressee, namely Davis Carr, P.O. Box 7646, Nashville, Tennessee, was also one of the "known dealers in illegal traffic of gold coins" (Tr. 5, 39-40; A. 5, 16).

2) That at 1:30 p.m. the Appellee admitted having taken two parcels to Mount Vernon, Washington to Corporal Charles J. Crosson of the Royal Canadian Mounted Police (Tr. 30-32, 36).

A daytime Search Warrant was applied for and issued between 3 and 4 p.m. Friday, March 29, 1968 and served on postal officials at 6:30 p.m. The two packages were opened and discovered to contain gold coins more than twenty-four hours after customs learned of the presence

of the coins at the post office in Mount Vernon (Tr. 48, 53, 54, 59-60; Ex. 4 Tr. 61; Tr. 64; A. 7, 9, 18, 19).

The Appellee was convicted after a jury trial in the United States District Court for the Western District of Washington for violating 18 U.S.C. § 545 and sentenced to three years in prison and fined $1,500 (A. 22). This decision was reversed by the Court of Appeals. 414 F.2d 758 (A. 23).

Summary of Argument

United States Officials had all the evidence they needed at 2:35 p.m. (Pacific Standard Time) on March 28, 1968, to obtain a Search Warrant to open the two packages, and under the applicable decisions of this Court the United States Officials were immediately obligated to secure such a Warrant. Instead, they detained the two packages for an unreasonable length of time, without making overnight investigations, and in violation of the Fourth Amendment of the Constitution of the United States.

This Court has emphasized and re-emphasized that, with few narrowly defined exceptions not here relevant, the Fourth Amendment requires law enforcement officials to secure a Warrant before conducting a search of private property. E.g., *Chimel* v. *California,* 395 U.S. 752 (1969). United States Customs and Postal Officials have failed to follow the commands of the Court in this case. Furthermore, in an early decision, *Ex Parte Jackson,* 96 U.S. 727 (1878), this Court stated that sealed packages delivered through the mails are as secure by the provisions of the Fourth Amendment from prying into their contents as are the papers and effects in our own homes. As a result law en-

forcement officials must obtain a Search Warrant before searching and seizing first-class mail. Cf. *Oliver* v. *United States,* 239 F.2d 819 (8th Cir. 1957), *Lustiger* v. *United States,* 386 F.2d 132 (9th Cir. 1967). Federal Customs and Postal Officials did obtain a Search Warrant in this case but only after having unreasonably detained the packages without a Warrant. This is in accordance with this Court's requirements set forth in *Terry* v. *Ohio,* 392 U.S. 1, 20-21 (1968); cf. *Warden* v. *Hayden,* 387 U.S. 294 (1967).

The packages were mailed at approximately 1:30 p.m. and by 2:35 p.m. Customs Officer O'Hearn "knew that the addressee of one of the packages was under investigation for trafficking in gold coins". The Court of Appeals held that this additional fact, if additional facts be needed, supplied probable cause to search the packages (A. 24-25). A Search Warrant could have issued at this time, and it would have given customs officials ample time to properly seize the contents of the packages without violating the Fourth Amendment. However, it should be noted that they did not obtain a Search Warrant until more than twenty-four hours later (4 p.m. (Pacific Standard Time) on March 29, 1968, but they had probable cause at 2:35 p.m. on the day preceding) and it was not served until 6:30 p.m. on postal officials holding the packages. (See statement.)

Because of the delay in issuing the Warrant the Court of Appeals held that the period during which the packages were detained, twenty-nine hours, "was unreasonably long, and the officers should have obtained a Warrant authorizing the detention. *Katz* v. *United States,* 389 U.S. 347 (1967); *Lustiger* v. *United States, supra;* see *Davis* v. *Mississippi,* 394 U.S. 721 (1969); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967)."

Further, the detention of the packages for an unreasonable time is a violation of statutory and regulatory law as promulgated by Congress to protect first-class mail. (See appendix to this Brief.) The government would have us believe that in no way were the Appellee's rights violated as the investigation would have been conducted the same way even if the packages had been forwarded to their destinations and Search Warrants issued there. However, they have failed to give us any citation in this respect nor have they shown how this is possible. All the information obtained was given in violation of the Postal Code.

Further, the Court below did not reach the claim that the Affidavit in support of the Search Warrant was insufficient as it reversed "on the basis of Appellant's first claim" (A. 23). It is respectfully submitted that had this issue been reached, a finding would have been made that the Warrant was not issued as a result of personal knowledge of Customs Officer O'Hearn, nor did it give pertinent source information; it does not contain his statement as to creditability of the source material or its reliability and as a result the Search Warrant should not have been issued and, having been issued, its fruits should have been suppressed and returned to the Appellee.

Last but not least, it is respectfully submitted that when an individual submits packages to the government postal authorities, the status of these packages is in the form of a trust and, having passed from the individual's control, they should be expeditiously sent on their way to their destination. Postal authorities have accepted the packages in trust and as such, Congress has laid down specific laws or statutes dealing with the status of first-class mail. Violation of these statutes and of the regulations issued

pursuant to the statutes resulted in Appellee's erroneous conviction which was properly overturned by the Court of Appeals and therefore, it is respectfully submitted, that that decision should be upheld, it being consonant with the theories and reasoning as set forth by this Court.

ARGUMENT

I.

The Unreasonable Detention of Respondent's Packages Beyond the Short Time Needed to Make a Limited Investigation and Apply for a Search Warrant Violated the Fourth Amendment.

When deciding this case, this Court must be ever mindful that lurking behind it is the specter of preventive detention. Preventive detention with respect to property, not a human being, but nonetheless, preventive detention under the Fourth Amendment. It is submitted that this Court ought to be wary of approaching preventive detention and keep secure the protections of the Fourth Amendment.

To the average person, the mailing of valuable coins by registering and insuring them through the United States Post Office would seem the safest means of transporting them to their destination. It is common knowledge that vast sums of money, and even so fabulous a gem as the Hope diamond, were and are safely delivered to their destination. This reliance is a function of public trust of our Post Office officials.

Since 1878, first-class mail has been fully protected under the Fourth Amendment, as are sealed packages, *Ex Parte Jackson,* 96 U.S. 727 (1878).

39 U.S.C. § 4251, entitled *"Definition"* states that "(a) First Class Mail consists of mailable . . . (4) matter closed against postal inspection". This is reiterated in 39 C.F.R. § 131.2, *"Classification,"* (a) Description, (1) First-class mail includes: . . . (v) Matter sealed or closed against inspection."

Only a short time is allowed before first-class mail is shipped out. 39 U.S.C. § 710 entitled: *"Making up Mail"* states that "letters brought for mailing to a postoffice half an hour before the time for the next forwarding mail shall be included therein unless, in the opinion of the Postmaster General, more time for making up the mail is required, they may be included in mail to be forwarded not more than one hour thereafter." Therefore, the government may detain mail only until such time as the mail is made up or for the next outgoing shipment.

18 U.S.C. § 1701, *"Obstruction of Mails Generally"* provides against obstruction of the mail, stating that "whoever knowingly and willfully obstructs or retards the passage of the mail . . . shall be fined not more than $100.00 or imprisoned not more than six months, or both."

Additionally, 18 U.S.C. § 1702 entitled *"Obstruction of correspondence"* states that "whoever takes any . . . package . . . which has been in any postoffice . . . before it has been delivered to the person to whom it was directed, with design to . . . pry into the business or secrets of another . . . shall be fined . . . or imprisoned." Yet the facts are that the two packages in this case had been inspected by, and had been delivered into the possession of Captain Charles A. Belgard of the Mount Vernon Police Department and Mr. Peterson of the Mount Vernon Fire Department (Tr. 3, 16, 20).

39 U.S.C. § 4057 entitled *"Opening First Class Mail"* states that "Only an employee opening dead mail by the authority of the Postmaster General, or a person holding a Search Warrant authorized by law may open any . . . parcel of the first-class which is in the custody of the department."

Information pertaining to the physical description of the mail and its outer appearance and writing on the cover may be legally obtained as a result of a mail cover, but 39 C.F.R. § 113.7 emphatically states:

> Authority to order a mail cover is restricted to the Chief Postal Inspector or your Postal Inspector in charge. Upon request of *either* of these officials, furnish them with information regarding the *address, return address* and *postmarks on mail.* When specifically requested by the Chief Postal Inspector or your Inspector *furnish such information to a designated Postal Inspector. Do not give such information to anyone else.* Requests for mail coverage shall be treated confidentially and there shall be strict compliance with the instructions outlined in the request. (Italics ours.)

This Court has previously stated that evidence obtained in violation of the statute or the Fourth Amendment demands suppression in a Federal Prosecution. *Draper* v. *United States,* 358 U.S. 308, 310 (1959) and *Weeks* v. *United States,* 232 U.S. 383 (1914). Similarly this Court has frequently upheld the regulations issued and interpreting the United States Code in such areas as taxation and, it is respectfully submitted, that it should do the same in this case as there has been a flagrant violation of the regulations.

There are no laws of Congress which can place in the hands of officials connected with the postal service any authority to invade the secrecy of sealed packages and "all regulations adopted as to mail matter of this kind must be in subordination to the great principles embodied in the Fourth Amendment of the Constitution." *Ex Parte Jackson*, 96 U.S. 727 at page 733 (1878).

As early as *Commerford* v. *Thompson*, 1 F. 417 (Cir. Ct. Ky. 1880), it was declared that the "act of Defendant in detaining letters was unauthorized as the act declared certain mail unmailable, but provides no machinery for their arrest and detention, probably because no such machinery was possible, *except by resort to the courts, without a violation of the Constitutional guarantee of the right of the people to be secure in their papers against unreasonable search and seizure.*" *Id.* at page 421. (Emphasis added.) Since that time of course regulations have been promulgated providing for the detention of items suspected of being statutorily unmailable.

39 C.F.R. § 124.9 entitled "Opinions on Mailability," states:

> (a) When in doubt as to the mailability of any matter described in §§ 124.2 (harmful matter), 124.3 (intoxicating liquors) and §§ 125.2 (conditions for mailing), 125.3 (perishable matter), and 125.4 (plant quarantines) of this chapter, the Post Master shall submit a sample or a complete statement of the facts to the Classification and Special Services Division, Bureau of Operations, and await instructions.
>
> (b) Postmasters and other employees of Post Offices shall not give opinions to the public concerning the

mailability of matter under §§ 124.4 (obscene and indecent matter), 124.5 (lotteries, frauds and libelous matter), 124.6 (disloyalty and threats to the President), 124.7 (copyright violations), 124.8 (certain foreign communications) and §§ 125.5 (concealable firearms), 125.6 (switchblade knives) of this chapter. When in doubt as to the mailability of any such matter, the Post Master shall withhold it from dispatch or delivery, and shall send a sample or a complete statement of the facts to the Mailability Division, Office of the General Counsel, for instructions. Newspaper (sic) containing doubtful matter should be promptly reported to the Mailability Division, Office of the General Counsel, but they should not be withheld from dispatch without specific instructions. (Captions in parentheses supplied.)

Any of the above would give postal authorities cause to detain a package pending further investigation, but, it is submitted that this case does not fit in any one of the definitions given above. These regulations could have been quite readily checked through the Postal Manual kept by the Post Master.

Since, by the regulations, there is no reason to withhold the dispatch of the mail we must pause and reflect—how did the information regarding the addressees, return address, the size, weight and outward manifestations of the package come to the attention of Customs Officer O'Hearn? As previously noted the postal clerk had allowed the packages to be in the possession of Captain Belgard who in turn had contacted a Sergeant James E. McKenzie of the R.C.M.P. who in turn passed the information on to O'Hearn (Tr. 10, 20, 28, 39-40, 43, 47).

We have been able to find but one case, and that from the Third Circuit, which upheld a conviction on the basis that the Postal Regulations do not prohibit a "mail watch" and that such information may be furnished to Postal Inspectors but the Postal Inspectors may pass this information on to whom they see fit. *United States* v. *Schwartz,* 283 F.2d 107 (3rd Cir. 1960). The Court went on to say at page 111 "since there was no violation of the Postal Regulations we need not consider the question whether evidence obtained in violation of such regulations could be admissible in a Federal Court." The case was duly appealed to this Court which confirmed the conviction at 364 U.S. 942.

The *Schwartz* case dealt essentially with a mail watch but it is interesting in that it also dealt with violations of the Post Office regulations. In that particular instance the information had been leaked by the Postal Inspectors who had access to such information. But, it is respectfully submitted that the information in the instant case came from a postal clerk or assistant postmaster directly to (but not through a postal inspector) a police officer and eventually through to the customs people.

Oliver v. *United States,* 239 F.2d 819 (8th Cir. 1957) at page 822 suggested that "the legislative measures and administrative regulations may themselves be determinative of the official impropriety or legal unfairness of the acts done, so that there is no need to go further. Such it seems to us is, on the Postal Statutes and Regulations existing at the time of this search and seizure involved, the case that is before us." While that case involved the seizure and opening of a package without a Warrant, it is respectfully submitted that the reasoning is basically sound and in accord

with this Court's reasoning, although no case has been found on point.

We submit that there was ample known evidence by 2:35 p.m. on March 28, 1968, to show probable cause to obtain a Search Warrant. We submit first, that the detention of appellee's packages and the giving of information off of them to others than Postal Inspectors violated Postal Regulations and Postal Statutes and therefore the evidence should have been suppressed. Second, that even assuming that a brief detention were valid, the authorities had information to the effect that a) the packages contained coins insured for $10,000 on each package; b) the return address on each package was the same although fake; c) that one of the addressees was a known dealer in illegal trafficking of gold coins; and d) the person or persons mailing the packages drove away in a Canadian licensed vehicle (Statement), all of which provided the necessary probable cause for the issuance of a Search Warrant. This was not done.

The first and most important requirement of constitutionality is that the Warrant be based on probable cause. Although the latter term defies precise definition, it generally is held to exist where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a crime has been committed. But establishing the fact of the crime is not enough. Probable cause for a Search Warrant also required facts sufficient to support a belief that instrumentalities or fruits of the crime, or contraband, are located in the place to be searched. *Jones* v. *U. S.*, 362 U.S. 257, 271 (1960).

> "The presence of a Search Warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . We cannot be true to that constitutional requirement and excuse the absence of a Search Warrant without a showing by those who seek exemption from the constitutional mandates that the exigencies of the situation make that course imperative." *McDonald* v. *U. S.*, 335 U.S. 451, 455-456 (1948), is as true today as it was in 1948, if not more so.

The only two additional facts ascertained by the government after 2:35 p.m. on the date of mailing were cumulative, revealing nothing new: (1) that the second addressee was a suspected trafficker in gold coins and (2) that the Appellee had admitted to mailing the packages to R.C.M.P. Corporal Charles J. Crosson (Tr. 5-32, 36, 39-40; A. 5, 16).

Consider as an example the case of *Porter* v. *U. S.*, 335 F.2d 602 (9th Cir. 1964). An F.B.I. agent had filed Affidavits before a U. S. Commissioner stating that he sought certain items in Defendant's vehicle and named them with particularity. At the same time he asked for a Search Warrant for a second automobile stated to be that of the Defendant also. On his appeal the Defendant claimed that the Warrant failed to show probable cause for believing the articles listed would be found in the designated automobile. The Appellate Court rejected this argument, stating "Particularly in this case of two automobiles . . . it might be imprudent for the police to risk the possibility that the one which contained the evidence would be driven beyond reach while the other was being searched." *Id.* at 605. In short, probable cause turns upon probabilities,

not certainties and not necessarily eventual truth. *Brinegar* v. *U. S.*, 338 U.S. 160 (1949). It is based on the practical considerations of everyday life in which reasonable and prudent men, not legal technicians, act.

We believe that the holding by the Court of Appeals is correct and should be affirmed by this court in that:

> First class mail is protected by the Fourth Amendment. *Ex Parte Jackson,* 96 U.S. 727 (1878). *Oliver* v. *United States,* 239 F.2d 818 (8th Cir. 1957). In *Lustiger* v. *United States,* 386 F.2d 132 (9th Cir. 1967), the Court said:
>
> "The protection against unreasonable search and seizure of one's papers or other effects, guaranteed by the Fourth Amendment extends to their presence in the mails * * *. Thus, first class mail *cannot be seized and retained,* nor opened and searched, without the authority of a Search Warrant." 386 F.2d 139. (Emphasis added.)

The Fourth Amendment protects "the right of the people to be secure * * * in their papers and effects, against unreasonable searches and seizures." The information known to Captain Belgard immediately after Appellant mailed the packages would reasonably have justified a brief detention, without a warrant, while a further investigation would be made. *Terry* v. *Ohio,* 392 U.S. 1, 20-21 (1968); cf. *Warden* v. *Hayden,* 387 U.S. 294 (1967).

By 3:00 P.M., O'Hearn knew that the addressee of one of the packages was under investigation for trafficking in gold coins. This additional fact supplied probable cause to search the packages. Instead,

O'Hearn decided to wait until the following day so he could call the customs office at the destination of the second package. This decision represents an understandable exercise of caution. Nevertheless, as a result of this delay, the packages were detained for 29 hours at the post office. This period was unreasonably long, and the officers should have obtained a warrant authorizing the detention. *Katz* v. *United States,* 389 U.S. 347 (1967); *Lustiger* v. *United States, supra;* see *Davis* v. *Mississippi,* —— U.S. ——, 37 USLW 4359 (1969); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967).

In *Katz,* the Government urged the Court to "retroactively validate" the conduct of its agents who had eavesdropped on the defendant's telephone conversations. The Government argued that the agents "did no more than they might properly have done with prior judicial sanction." 389 U.S. at 356. The Court rejected this argument:

> "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer * * *. Searches conducted without Warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' * * * for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *.'" 389 U.S. at 356-57.

In the present case, the length of time that the packages were retained by the post office made prior judicial authorization necessary (A. 24-25).

We submit that the United States postal and customs officials had probable cause at 2:35 p.m. (Pacific Standard Time) on March 28, 1968, and were required to obtain a warrant at that time in order to detain the packages any longer. If this Court should disagree with the immediate above submission, then surely, it will agree that the officials had probable cause early in the morning of March 29, 1968, after the telephone call to customs officials in Mobile, Alabama. But the officials did not apply for a warrant in the morning of March 29, 1968. Instead, they waited until 4 p.m. to apply. We submit that this unreasonable lapse of time after having probable cause violates the Fourth Amendment.

II.

A Search Warrant Granted Solely on an Affidavit Which Alleges Five Facts, Four of Them Being Based on Hearsay Evidence Compounded on Top of Hearsay Evidence Is a Violation of FRCP 41(e).

The Search Warrant should never have been issued. It was. The evidence obtained should have been suppressed. It wasn't. An analysis of the latest leading cases gives us a view of the problems involved.

It is elementary that in passing on the validity of a Warrant, the reviewing court may consider only information brought to the Magistrate's attention. *Giordenello* v. *United States,* 357 U.S. 480 (1958).

Ventresca v. *United States,* 380 U.S. 102 (1961) gives us the following guide lines:

1. The informed and deliberate determinations of the Magistrates impowered to issue Warrants are to be pre-

ferred over the varied actions of officers who may happen to make arrests.

2. In a doubtful or marginal case the search under Warrant may be sustained where without it the search would fall.

3. A Warrant must find probable cause but that means less than evidence which would justify condemnation and may rest on evidence not legally competent in a trial.

4. Hearsay may be the basis so long as there is a substantial basis for crediting the hearsay.

5. An Affidavit may be based on hearsay and need not reflect personal observations of the Affiant so long as the Magistrate is informed of some of the underlying circumstances supporting the Affiant's conclusions and his belief that the informant involved, whose identification needn't be disclosed, was credible or his information reliable.

6. Probable cause cannot be made out of Affidavits which are conclusory, i.e., those which state only beliefs without detailing the underlying circumstances.

7. Marginal cases should be given preference.

Jones v. *United States*, 362 U.S. 257 (1960), which is commonly cited for the rule that hearsay may be used in an Affidavit, was analyzed by Justice Douglas in *Ventresca* at page 121:

> In *Jones* the basis for crediting the informant's hearsay was (1) the Affidavit swore that the informant had previously given information to him which was cor-

rect; (2) the Affiant had been given corroborating information by other informants; and (3) the Affiant was independently familiar with the persons claimed by the informant to be concealing narcotics in their apartment, he knew them to have admitted to the use of narcotics.

This Court reversed the Court of Appeals and stated in effect that the Affidavit was based upon observations of the Affiant, his personal knowledge as well as information which he had received from other investigators assigned to the investigation. As a result, what happens when the above rules are applied to the facts given in the Affidavit for the issuance of a Search Warrant in the instant case?

Fact No. I: "Your Affiant has information through United States Customs channels that the addressees on the packages in question are known dealers in the illegal traffic of gold coins. This information came from U. S. Customs Agents" (A. 5). *Rule No. Four, supra,* applies to hearsay information. "Information through United States Customs channels" means what? The statement does not say anything other than this information came from U. S. Customs agents without the source being detailed. It is submitted that this would in effect give us a situation where we have hearsay on hearsay. But is there a substantial basis for crediting the hearsay?

Fact No. II: "Your Affiant has received information that when the packages were deposited with Post Office authorities in Mount Vernon, Washington, in response to an inquiry by the Postal Clerk to determine the contents of the packages, it was stated that the packages contained coins" (A. 6). *Rules Number Four and Five, supra,* would seem

to apply. But where is the *substantial basis* for crediting the hearsay? In assuming that the informant need not be identified there is nothing to inform the Magistrate of the underlying circumstances and whether the information is creditable or reliable.

Fact No. III: "Each of the packages were insured for $10,000" (A. 6). There is nothing whatsoever to indicate whether this is based on personal knowledge, hearsay, personal observations or what. There is no background given.

Fact No. IV: "The residence indicated as a return address on each package is now unoccupied and has been unoccupied for six weeks" (A. 6). Again the observations noted for Fact No. III would apply here.

Fact No. V: "Your Affiant has information obtained from Charles Bellgard (sic) of Mt. Vernon P. D. indicating that the persons who mailed the packages at Mount Vernon, Washington, were driving an automobile with Canadian license plates" (A. 6). This particular fact falls squarely within *Rule No. IV, supra,* and there is no disputing that it does have a substantial basis. However, we should note that the information has come from Captain Belgard through Sergeant McKenzie. (See Statement.) But once again this is hearsay based on hearsay. No factual background is given in the Affidavit.

As to the rest of the facts, do we have probable cause for the issuance of a Warrant? Granted that this is less than evidence which would justify condemnation and is not competent in a trial still, the Magistrate must be informed of the underlying circumstances. The Affiant must state that his sources of information are credible and reliable if he does not care to divulge the source. There are no personal

observations made as in *Jones*. There is no corroborating information from other sources. The Affiant was not independently familiar with the packages nor the persons mailing them. As a result the Search Warrant should never have been issued. Now it must be suppressed and the seized merchandise returned to appellee.

Accordingly, when the source of information is a reliable and confidential informant, the officer should set out the approximate time the informant got his information, how he got it, and the basis for the Affiant's belief that the informant is reliable, such as the fact that he had been used for a specified length of time, the approximate number and the type of cases in which he had previously given information, and a statement as to the accuracy of the information given by him in past cases. See, e.g., *Jones* v. *U. S.*, 362 U.S. 257 (1960).

It is respectfully submitted that it is not necessary, of course, that the officer state all the facts known about the case, but only enough information for the commissioner or Magistrate to determine from a reading of the Affidavit by itself, that there is sufficient probable cause to justify the issuance of a Warrant.

III.

Reply to Government's Argument.[1]

1. Reply to: Introduction and Summary

The government contends that federal customs and postal officials conducted an overnight investigation in order to

[1] Citations to the Government's Brief will be given as G. 1, G. 15, etc.

confirm suspicions created by the circumstances of Respondent's mailing of the two packages (G. 4, 5). That this is not so is borne out by the government's Statement (G. 3) that by 3 p.m. Officer O'Hearn had phoned the customs office in Van Nuys and learned that the addressee of one of the packages was under investigation for trafficking in illegal coins. But "because of the time differential, O'Hearn could not reach the customs office in Nashville, Tennessee, the destination of the other package on the same afternoon (G. 3, G. 3 n2). Furthermore, there is not one statement anywhere in the Record, and the Government has given no citation, indicating or supporting the view that postal and/or customs officials conducted any type of overnight investigation in order to confirm or explore further their suspicions created by Respondent's mailing of two packages. Their suspicions and probable cause were complete as of 2:35 p.m. March 28, 1968. (See Statement.)

The Court of Appeals did not find "that the Warrant was properly issued on sufficient facts to justify a search; nor did it question the government's right to seize and retain the coins which the search uncovered" (G. 5). It is respectfully submitted that the Court of Appeals did not reach this issue (A. 23).

The Government would try to analogize between the detention of an individual for a period of time and the detention of personalty for a like period. However, detention of an individual can be tested by a Writ of Habeas Corpus. There is no comparable testing for personalty.

When the government states that there is "no relationship whatever in this case between the detention of the packages and the investigation which produced the facts to

justify the Warrant" (G. 6) it is correct. The detention of the packages lasted at least twenty-nine hours and the investigation which produced the facts necessary to justify a Warrant took only two hours. Therefore, the officers had a choice: either to obtain a Search Warrant or to continue their investigation of the packages after their having been sent on their way under the aegis of a mail watch.

The Government would have us believe that by delaying the application for a Warrant until the following morning the Court of Appeals held that the agents had detained the packages unreasonably (G. 7). In fact, the government did not apply for a Search Warrant until 4 p.m. the following day. (See Statement.) Therefore, assuming that the detention overnight were reasonable, we have nothing stating the reasonableness from morning until late afternoon.

At some point in time the Government has unreasonably detained the Appellee's packages and as such their introduction into evidence against him should have been suppressed as the Court of Appeals so held. Furthermore the question arises as to the status of the packages. They were not under the Appellee's control, therefore they should have proceeded on their journey.

The Government goes on to state that "the Court below erroneously read the Fourth Amendment to prohibit governmental conduct which is entirely consistent with the practice of prior judicial authorization for searches with which the Amendment contemplates (G. 7). However there is no citation of case authority nor has one been found to back this statement.

2. Reply to the argument that: THE DETENTION OF RESPONDENT'S PACKAGES FOR A REASONABLE TIME NEEDED TO MAKE A LIMITED INVESTIGATION AND APPLY FOR A SEARCH WARRANT DID NOT VIOLATE THE FOURTH AMENDMENT (G. 7).

1). We agree that "this Court's opinions lend support to the proposition that the Fourth Amendment allows law enforcement officers to take limited action, reasonable under the circumstances, to prevent the removal or destruction of suspected property pending the issuance of a Search Warrant" (G. 7-8). However the time delay in this case was unreasonable. The cases cited by the government do not seem to have an intervening statute which would seem to control. In the instant case we are dealing with the detention of mail which is protected by Congress having enacted specific statutes under the United States Code, Title 39 entitled THE POSTAL SERVICE.

As a result the period of watching the premises from which government agents observed or had smelled the odor of whiskey in *Taylor* v. *United States*, 286 U.S. 1, 6 (1932), is a situation where the Defendants had the premises under their control. The same holds true for *Trupiano* v. *United States*, 334 U.S. 699 (1948). In each of these instances cited the property was under the control of the suspects whereas in the instant case the property was within the control and the possession of a governmental entity i.e., the Post Office.

Granted that an agent is authorized not only to watch but to guard others from removing the property but, a mail watch would have sufficed in this instance. Would the government have us believe that it is necessary to have one governmental agency restrict another govern-

mental agency from removing property so that it is not sent on its way?

While it is true that the rights of private individuals are unavoidably interfered with when agents take action to prevent the removal or destruction of suspected property pending the issuance of a Search Warrant, in this particular instance there are no private individuals seeking to inhibit the government's actions. Since the only means of detaining property is spelled out in the government regulations under the mailability section there would seem to be no basis for the detention of the packages at all. Hence, the Court of Appeals had suggested that an interim detention be done under Court authorization which is most reasonable, especially in light of *Commerford* v. *Thompson*, 1 F. 417 (Cir. Ct. Ky. 1880). "While the Fourth Amendment does not compel the creation of a novel procedure to warrant such detention" (G. 9) it is respectfully submitted that the statutory law does under the present circumstances.

The searches of automobiles and arrests and incidental searches of persons are entirely independent circumstances and are not regulated by statute as are the packages in the first-class mail and their movement in the instant case.

"Where the circumstances unmistakably establish probable cause to search the property, it is hardly to be doubted that the officer acts reasonably by detaining the property without search, during the time required to prepare the Affidavit and a Warrant and to obtain a Magistrate's disposition on the application" (G. 10). While this is undoubtedly true, in this particular case the Appellee had no control over the property once he had deposited it in the mails. As a result to uphold the Government's conten-

tion in this instance would enable the investigating authorities to go forum shopping for a Magistrate willing to issue a Search Warrant. If it cannot be obtained at the place where the packages are deposited then it can be obtained at the destination of the packages. It is respectfully suggested that the destination being known that this is what would eventually result.

The Government goes on to state that the detention of the packages in order to give the officers time to make relative inquiries is justified. But, the packages should have been sent on their way and, as stated by Circuit Judge Chambers, in his concurring opinion:

> I think I am as sensitive as anyone to the Fourth Amendment in protecting one's person and one's home. But the detention of Van Leeuwen's "hot money" at the postoffice for 29 hours does not offend me very much. Someone in the postoffice holds up much of my mail over 29 hours.
>
> I concur in the reversal only because I think precedent, which we must follow, requires us to reverse (A. 26).

As in the case of other actions which interfere with either personal or property rights the conduct of law enforcement officials must be reasonable under the circumstances. The interference "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible". In assessing its legality under the Fourth Amendment, the "inquiry is a dual one—whether the officer's action was justified at its conception, and whether it was reasonably related in scope to the circumstances

which justified the interference in the first place." *Terry* v. *Ohio,* 392 U.S. 1, 19-20 (1968) (G. 11).

A careful analysis of this quotation is necessary. "The conduct of law enforcement officials must be reasonable under the circumstances." This court has previously held in *Draper* v. *United States,* 358 U.S. 308 (1959) and other cases, that the violation of a statute calls for the suppression of evidence in a Federal Prosecution.

Secondly *Terry* related to a search and frisk operation and not to the detention of a person or item for 29 hours.

2). The Government states that it would have been "unwise to send the packages out of the district, with the possible risk of loss or destruction of evidence, without their ever having been opened" (G. 13). The packages were under the control of the United States Government at all times. The fact that the issuance of two Search Warrants may have been required does not absolve the government from detaining the packages for an unreasonable length of time. The Government would suggest that the additional time required would take additional manpower. Once again we bring only to the Court's attention the availability of the mail watch.

3. Reply to the argument that: THE PERIOD DURING WHICH THE PACKAGES WERE DETAINED WAS NOT UNREASONABLE (G. 13).

The Court of Appeals did not fault the Government for waiting until the following day so much as it faulted the Government for not acting when it had sufficient information on which to obtain a Search Warrant. Nowhere has the Government cited a case wherein the exercise of cau-

tion by an officer for such a lengthy period of time *after* having reasonable cause has been upheld.

The Government's argument is specious that "if it has any bearing on the question here, the fact that the officers already had probable cause to search supports the reasonableness of their conduct, because it eliminates the risk that the packages were being held without likelihood that a warrant would be issued." (G. 14). However, it is unable to cite a case that the likelihood of a Warrant being issued is a basis for detaining property for such a lengthy period of time after having once obtained reasonable cause.

In this day of instant communication, the Government was able to obtain information to the effect that one of the packages was addressed to a trafficker in illegal gold coins. Therefore the Government had reason to believe that the other package was also addressed to a trafficker in illegal gold coins.

The Government's argument (at G. 15) would have us believe that it was necessary to obtain information relating to the Nashville addressee before a Magistrate would issue a Warrant. But at no time did the Government submit the information which it did have by 2:35 p.m. on the date of mailing of the packages to a Magistrate. If it had done so it may have succeeded in obtaining a Warrant. That this was not done is no excuse for waiting an additional 24 hours. Had the Government done so and, if it had not obtained a Warrant, then, and in that case, the longer detention may have been reasonable.

Conclusions

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be confirmed when post office and/or customs officials knowingly detain registered, first-class packages for at least 24 hours after said officials were in possession of information sufficient to enable them to obtain a Search Warrant to open the packages and discover whether they contained illegal matter and did not do so.

The decision should be further affirmed in that the Search Warrant was granted solely on an Affidavit which alleged five facts, four of them being based on hearsay evidence compounded on top of hearsay evidence such Affidavit not being consonant with this Court's directions.

Respectfully submitted,

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